It is readily apparent the swing was completed by 2058 or 2059 at the latest. The collision was at 2106. ***Nowhere is there a finding of fact by Judge Hoffman that the swing was completed when the tanker was only two ship lengths distant, as found by the Circuit Court.***

Prior to taking in the anchor, the "RIO" was exhibiting two white anchor lights, and on taking in the anchor these lights were extinguished and her underway lights, that is, her red and green side lights, and her two white masthead lights were turned on. In addition to this, two red "all around "out of command lights were hoisted above the bridge, a distance of six feet apart, in a vertical line. (Perez Appx. 5a; Francis Appx. 36a) Initially kerosene lighting elements were utilized in these red lights, but shortly after they had been put up, these elements were replaced with electric filaments. (Perez Appx. 6a) (Kliemczak Appx. 14a) (Leitao Appx. 16a)

Those on the "RIO" sighted "THE CABINS" approaching from the southeast when she was several miles away. At this time, and for some time thereafter, "THE CABINS" was proceeding northwesterly (312-316° T.) and the "RIO" was drifting northwesterly (Approximately 315° T.) so for all intents and purposes the drifting of the "RIO" can be disregarded, and the situation is the same as if the "RIO" had been a stationar yvessel. Furthermore, both vessels were subject to the same tide, or on the "same carpet" and hence, the only relative movement between the two was the movement created by "THE CABINS". There

is no evidence in the record to support the Lower Court's statement that the "RIO" drifted across the path of "THE CABINS". In fact, in support of its finding on this point, the District Court seemed to have confused "heading" with the direction of drift, for in his opinion, Judge Hoffman said:

> "Acting under the pilot's orders the anchor was heaved, and the vessel drifted on the tide and wind from her southeasterly heading, to her left in a semi-circle to a generally northerly heading away from the restricted area and directly toward the path of "THE CABINS". (Memorandum Opinion of District Court Appx. 41a)
>
> * * *
>
> "The pilot was likewise aware of the fact that the "RIO", if permitted to drift, would cross the intended path of "THE CABINS". (Memorandum Opinion of District Court Appx. 42a).
>
> "The head (bow of 'RIO') swung around to aNNE heading, and *commenced drifting towards the northwest*" (Italics ours) (Memorandum Opinion of District Court Appx. 43a).

It is true that the bow of "RIO" swung from the southeast around to a northerly heading, but she then drifted with the southeast wind and flood tide in a northwesterly direction, and this fact, which has been found by the court below (see above) is not in dispute. (Francis Appx. 37a; Perez Appx. 7a).

"THE CABINS" was inbound from the southeast for Baltimore. She had called the Maryland pilot vessel by radio telephone and had been told that the

pilot launch would meet her in the vicinity of Buoy "2A". All of her course changes and reduction in speed from this moment until 2104½ (one and one-half minutes before the collision) when she went half astern, were made with regard to meeting the pilot launch at Buoy "2A" and not because of the presence of "RIO". (Smith Appx. 32a).

"THE CABINS", on arrival at Buoy "2-CB" passed this buoy, keeping it to starboard at a distance of about one-half mile and changed course to 312° T. in order to head for the general vicinity of Buoy "2A". (Reed Appx. 17a). She was making her full sea speed of fourteen and one-half knots at this time and she varied her heading slightly to make good her base course of 312° T. At 2048 she noted "arrival" in her log book and reduced speed to her full maneuvering speed of about 12 knots. (70 rpm) (Reed Appx. 17a) About two minutes after this those, in charge of "THE CABINS" observed the lights of the "RIO" "apparently working with the pilot boat, either discharging or taking on a pilot." (Reed Appx. 22a; Smith Appx. 24a) At this time "RIO" was about three to three and one-half miles away. (Reed Appx. 19a). At 2053 speed was reduced to half ahead at 2053½ to slow ahead. (Engine room bell book, Resp. Ex. 2). At 2057 course was changed to 316° T. to head for Buoy "2-A". (Reed Appx. 18a; Smith Appx.). At 2058, eight minutes prior to collision, Captain Smith, of the tanker, was for the first time made aware of the helpless condition of the "RIO MARACANA". As found by the District Court:

> "* * * THE CABINS' master admitted having seen one red light above the "RIO's" bridge

deck house at approximately the same time he observed the green starboard running light which was at or about 2058. "THE CABINS' Chief Officer indicated that he had initially seen a single red light that showed up momentarily over the 'RIO's' bridge, but that it thereafter disappeared. The testimony of 'THE CABINS' master is somewhat evasive and contradictory as to what he then did upon seeing the red light and the green light. On direct examination he states that this occurred at 2104, only two minutes prior to the collision, whereas he had previously stated at the Coast Guard hearing that he noted the green and red lights at approximately 2058, about eight minutes before the collision. *The latter estimate of time appears to be more worthy of belief."* (Appx. 45a) (Italics ours). (Memorandum Opinion of District Court Appx.)

THE CABINS' master actually considered the 'RIO' might be an 'out of command vessel' when he first saw the extra 'red light above his (the 'RIO's') deck house' at a distance of 'approximately three-quarters of a mile. (see Appx. 31a).

After altering course to 316° "THE CABINS" settled on a heading of 315° and at 2101 she reduced speed to a dead slow ahead, about six knots. (Reed Appx.). At 2101 (course recorder time) she changed course inexplicably to the right to 338°. At 2303 (course recorder time) she commenced a left swing. At 2104½ she went half astern (Engine Room Bell Book, Resp. Ex. 2). At 2105 a full astern order was given, followed fifteen seconds later by a full ahead, at 2105 1/4. At 2106 the collision occurred with the port side of "THE CABINS", in the way of tanks

Nos. 3 and 4, coming into contact with the bow of the "RIO", at a 90° angle, the bow of "RIO" scraping down the side of "THE CABINS." (Reed Appx. 21a) (Memorandum Opinion of District Court Appx. 50a).

REASONS FOR GRANTING THE WRIT

I. The Court below seriously erred as a matter of law in establishing an erroneous rule of evidence insofar as the burden of proof in ship collision cases is concerned and directly *contra* to this Court's decision in *the CITY OF NEW YORK,* 147 U. S. 72, 85.

In its *per curiam* opinion the Court of Appeals stated as follows:

> "The case is a typical one for the application of the established rule that when the fault on the part of one vessel in a collision, sufficient to account for the disaster, is established by uncontroverted proof, it is not enough to raise doubts about the management of the other vessel, but in order to hold her liable there must be *proof of fault beyond a reasonable doubt.*" (Italics ours) (Appx. 59a).

There is no rule of evidence more firmly settled than that requiring issues of fact in civil litigation to be determined in accordance with the *preponderance of the evidence. New York L. Ins. Co.* v. *Gamer,* 303 U. S. 161; *Fidelity Mut. Life Asso.* v. Nettler, 185 U. S. 308; and *Williams* v. *Conger,* 127 U. S. 397. Only in criminal matters is the degree of proof required that of the establishment of guilt *beyond a reasonable doubt* of the crime charged. *Holt* v. *United States,* 218 U. S. 245.

The Court of Appeals has established a new standard of proof in admiralty litigation, and completely *contra* to that set by Mr. Justice Brown in *the City of New York,* 147 U. S. 72, 85, where he stated:

> " * * * Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel, there is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor * * *"

Also, see the cases cited in *Griffin on Collision,* 1949 Edition, Sec. 224, "Major and Minor Faults". It is manifestly clear that there is no existing law that one ship at fault in a collision, in order to invite a division of damages, must make out the fault on the part of the other ship involved by *proof beyond a reasonable doubt.* Such a rule of evidence entirely distorts and changes the law of evidence relative to the burden of proof in admiralty litigation, and the importance of this question alone is sufficient to merit the granting of a writ.

II The lower court, in affirming the decision of the District Court completely disregarded the duty owed by a moving vessel to adopt every proper precaution required by the special circumstances of the case to prevent a collision, and particularly that of maintaining a careful lookout and taking constant bearings, contrary to the decision of this Court in *The SUNNYSIDE,* 91 U. S. 208.

The District Court glossed over the failure of THE CABINS to produce its lookout and helmsman, while the Court of Appeals made no mention of the fact, in spite of the tanker's failure to render any explanation for not presenting their testimony. (Appx.) Neither Court mentioned the inference in law which arises that the evidence of such witnesses would not have been favorable. See *The NEW YORK,* 175 U. S. 187, 204; *The GEORGETOWN,* 135 Fed. 854; *The POCOMOKE,* 150 Fed. 193, 196; *The CANANOVA,* 297 Fed. 658; The BRIGHT, (2 Cir) 45 F. 2 (d) 150.

The law was heretofore correctly applied by this Court in *The SUNNYSIDE,* supra, the facts of which are strikingly similar. That matter dealt with a case of special circumstances, as was the instant situation. The litigation concerned a collision between a drifting tug and a sailing vessel under way. Both were found at fault and the damages were divided. As to the faults of the sailing vessel, this Court stated at pp. 218-20:

> "Negligence more manifest, cupable or defensible, in view of the circumstances, is seldom exhibited in controversies of this character;and the only excuse offered for it is, that the 18th Sailing Rule provides that, where one of two ships is required to keep out of the way, the other shall keep her course; entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualification, that, in obeying and construing the rule, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary in order to avoid immedaite danger.

"Years before the Act of Congress referred to was passed, this court promulgated the doctrine, that rules of navigation are adopted to prevent collision, and to save life and property at sea, and not to promote such disasters; and decided that the *neglect of one or two approaching vessels to show the signal-lights required by law did not vary the obligations of the other to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision as the circumstances in which she was placed gave her the opportunity to employ.*" (italics ours)

"Vigilance as well as experience is required of a lookout; and, if he is inattentive to his duty, it is no sufficient excuse to say that he was competent to perform the required service. No doubt the bark had a lookout; and the evidence tends to prove that he was competent; but his own testimony shows conclusively that he did not properly perform his duty after the mate came forward and returned aft. He admits that he could not tell whether, at that time, the steam tug was stationary or in motion; and he must have known that the mate left the forecastle and went aft as ignorant upon the subject as he himself was.

"Suppose that was so, and there is no apparent reason to doubt it, then it was his plain duty, the moment he ascertained that the lights ahead were stationary, to have reported that fact to the mate as officer of he deck. Steamers in motion, the mate might think would take care of themselves; but the lookout could not know what the mate would think if he should be informed that the lights were stationary.

"*Viewed in the light of the circumstances, it is obvious that the mate and lookout of the bark*

had abundant time to have determined whether the steam tug was in motion, or only drifting, if they had used common care and ordinary vigilance in that regard, as they were bound to do; nor would there have been any difficulty in avoiding the collision, if proper precaution had been seasonably adopted for that purpose; and, inasmuch as no such precaution was taken by those in charge of the deck of the bark, it follows that she also is in fault, and must answer for her proportion of the loss occasioned by the collision, *as the fault of the steam-tug does not excuse the fault of the bark, if the latter was in any substantial degree a contributory cause of the collision.* The Ariadne, 13 Wall. 479, 29 L Ed. 543." (Italics ours)

In the instant case, the RIO was a sitting duck, without motive power and incapable of taking any action to keep out of the way of the tanker, which could have readily avoided the collision by a few degrees change of course, or by maintaining the change of heading taken up at 2103 in her course change from 316° to 338°, or by going astern in time to kill her headway. None of these courses of action were taken, regardless of the fact that at 2058 (as found by the District Court) her Master sighted one of the out of command lights above the bridge. This was also acknowledged by Captain Smith at the Coast Guard hearing held four days after the collision when he stated:

"The 'RIO MARCANA' when at approximate angle of three points on our port bow started turning to the left showing his red and green running lights, eventually showing his green light completely. I at that time had glasses in my hand

looking at him and noticed a red light above his bridge deck house." (Smith Appx. 26a).

"Q. Approximately how far was he from you when you first noticed his green light?

"A. Approximately three-quarters of a mile".

"Q. When you first noticed the green lgiht alone and the single red light, did you give any thought to the question as to whether the vessel was out of command or not?

"A. Yes, I did, that was another reason for putting the engines full astern.

"Q. Is that the same action you would have taken if there had been an out of command signal?

"A. I would have taken the same action if the vessel had shown out of command lights or no out of command lights." (Smith Appx. 31a).

In spite of recognizing the ominous potentialties of the situation, the Master of the tanker did nothing but continue to steer into the jaws of collision. Certainly there was a duty to maintain a careful lookout which would have readily disclosed the RIO to have been a motionless vessel. Implicit in this duty to keep such a lookout was the duty on the part of THE CABINS to take compass bearings of the RIO, and if that had been done, it would have been seen there was no question but that the RIO was without power, or drifting.

The note preceding Art. 17 of the Inland Rules (33 U. S. Code 201) provides as follows:

"Risk of collision can, when circumstances permit, be ascertained by carefully watching the

compass bearing of an approaching vessel. If the bearing does no appreciably change, such risk should be deemed to exist."

And in speaking of this duty in *Marsden's Collisions At Sea,* 9th Ed. at page 352, the author states:

"The preliminary paragraph to the steering and sailing rules imposes a duty on the person in charge of a vessel to take compass bearings of the lights of other vessels as they come into view. A vessel will be held to blame for an omission to take bearings (when a collision might have been avoided, if the information, which observation of the bearings would have given, had been obtained.) (Citing The President Lincoln, 1911, p. 248). When the bearing of a light on a vessel ahead narrows, it indicates that she will cross ahead; when it broadens, that she will pass clear on the beam, if the course of neither vessel is altered."

In failing to rule there was a duty as a matter of law on the moving vessel to maintain a careful lookout, the lower court erred as a matter of law, and for this reason alone, a writ should be granted.

III The Court below based its decision upon a pivotal factual point not in any way supported by either the evidence, or the findings of fact of the District Court, while nevertheless affirming all of the findings of the District Court as to questions of fact.

In its *per curiam* opinion, the Lower Court stated as follows:

". . . THE CABINS proceeded at a reduced speed and as she drew within two ships' length of

the RIO MARCANA she noticed her swinging to the left and apparently directing her course across the path THE CABINS was taking. Thereupon the engines of THE CABINS were put in reverse in an effort to avoid a collision, but when it was seen to be inevitable the engines of THE CABINS were put full speed ahead with left rudder so as to lessen the impact of the blow, with the result that the bow of the RIO MARCANA struck the port side of THE CABINS . . . " Per Curiam Opinion, Appx. 56a).

In his opinion, Judge Hoffman expressly found the RIO's anchor was aweigh at 2055 or 2056 (10-11 minutes before collision), and that the vessel then swung to the north in approximately two or three minutes:

" . . . An appropriate estimate of the time when the anchor was aweight is 2055 or 2056."

"The RIO's pilot described the course of the vessel by stating that she 'spun around like a top' after the anchor was up. The head swung around to a NNE heading and commenced drifting towards the northwest. By reasons of its light draft, the heading from south to north was accomplished in approximately 2 to 3 minutes." (Appx. 43a).

It is readily apparent the swing was completed by 2058 or 2059 at the latest. The collision was at 2106. *Nowhere is there a finding of fact by Judge Hoffman that the swing was completed when the tanker was only two ships lengths distance.*

The finding of fact as to the time of the swing by the RIO is of the utmost importance as it follows there was a sufficient amount of time within which THE

CABINS could have taken evasive action and avoided the collision. THE CABINS, by the admissions of her own master, and as found by the District Court, had *eight minutes,* and not the time required to traverse two ship lengths distance, within which to take avoiding action in order to prevent collision with the drifting RIO, which was powerless to move.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Compania Nacional de
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